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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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MERCEDES-BENZ OF NORTH AMERICA, INC., PETITIONER

v.

METRIX WAREHOUSE, INC. and CARL SCHWARTZ,
RESPONDENTS

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the federal antitrust laws permit a distributor of high quality automobiles to require franchised dealers to use only genuine replacement parts in automobiles they service and repair, when that requirement is reasonably designed to meet the expectations of consumers, to avoid free-riding on warranties, and to assist in the maintenance of quality standards.

2. Whether, in the absence of any restraint on the free choice of consumers, such a requirement in franchise agreements may be held unlawful merely because there are hypothetical alternative requirements that would impose a lesser restriction on the autonomy of franchised dealers.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption to the petition, Daimler-Benz Aktiengesellschaft was a defendant in the district court. The district court directed a verdict in favor of Daimler-Benz Aktiengesellschaft at the close of plaintiff's case.

## PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Rules of this Court, petitioner states that Mercedes-Benz of North America, Inc. is a Delaware corporation and a wholly-owned subsidiary of Daimler-Benz of North America, Inc., which in turn is a wholly-owned subsidiary of Daimler-Benz Aktiengesellschaft, the manufacturer of Mercedes-Benz automobiles. There is no public holding of, or market for, the stock of Mercedes-Benz of North America, Inc. or the stock of any other United States subsidiary or affiliate of Daimler-Benz Aktiengesellschaft. Daimler-Benz Aktiengesellschaft is a share company organized under the laws of the Federal Republic of Germany that has no parent company. The stock of Daimler-Benz Aktiengesellschaft is traded on some public exchanges in Europe, but is not traded on any exchange (or, on any regular basis, over-the-counter) in the United States.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Mercedes-Benz of North America, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra*, 1a-28a) is reported at 828 F.2d 1033. The order of the court of appeals denying a timely petition for rehearing (App., *infra*, 29a-30a) is unreported. The opinion and order of the district court certifying this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (App., *infra*, 33a-42a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 14, 1987. The court of appeals denied rehearing on November 20, 1987 (App., *infra*, 29a-30a). On February 8, 1988, the Chief Justice entered an order extending the time to file a petition for a writ of certiorari to and including March 19, 1988 (*id.* at 43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Respondent Metrix Warehouse, Inc. ("Metrix") brought this treble damages suit against petitioner Mercedes-Benz of North America, Inc. ("MBNA") under Section 1 of the Sherman Act, 15 U.S.C. § 1, which forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ."

## STATEMENT

This case presents antitrust issues of substantial practical importance: the viability of the business justification defense and the applicability of the so-called "less restrictive alternative" doctrine to vertical restraints imposed in a franchise setting. The Fourth Circuit concluded that the restraint involved here—a contractual requirement that Mercedes-Benz dealers install only factory-approved and warranted replacement parts when performing factory-authorized service on Mercedes-Benz automobiles—violated the Sherman Act because the jury might have found that MBNA could have accomplished the legitimate goals fostered by the restraint through the use of hypothetical less restrictive alternatives. In so holding, the court below disregarded the rulings of this Court and other courts of appeals and followed a mechanistic and outmoded approach that bears no relationship to the procompetitive goals of the antitrust laws.

### A. Background Facts

#### 1. *Introduction*

There are 27 domestic manufacturers and importers selling passenger cars in the United States. Americans bought over ten million cars in 1987, of which General Motors sold approximately 3.7 million, Ford 2.1 million, Chrysler 1.1 million, Toyota and Honda over 600,000 each, and Mercedes-Benz approximately 90,000 (less than

1%). All automobiles are retailed in the United States under a franchise system. There are over 25,000 franchised automobile dealerships in the United States, of which only about 400 (less than 2%) are Mercedes-Benz dealerships. *Market Data Book Automotive News*, p. 105 (April 1987).

The franchise system has come to include several universal elements. Automobile franchise agreements generally require dealers to display the franchisor's trademarks, to employ factory-trained technicians, to use the manufacturer's sales materials, and to observe certain business hours. And all of them require dealers to maintain a factory-authorized service department, a requirement also imposed by the laws of many states. The dealers and the franchisor expect and intend to convey to the public the message that each dealer is the manufacturer's representative in a particular locality.

Car makers and dealers know that the cars they sell will periodically require warranty and nonwarranty service; they also know that consumer satisfaction with this service is essential to the success of the franchised enterprise. To accomplish this requires an adequate facility, a staff of competent personnel, a stock of replacement parts that are in daily demand, and fast access to parts for which demand is not regular.

In the dealer's service department, the manufacturer's trademark is prominently displayed, trademarked parts are advertised, and parts and service representatives wear uniforms with trademarks on them. The intention is to convey the message that this is an "authorized dealer" who services and repairs the cars he sells to meet "factory standards" through "factory-trained technicians" using "genuine parts." This message encourages vigorous interbrand competition by nurturing the public image that those who come to the dealer for new cars, service, or repairs will get the real thing.

### 2. *The Mercedes-Benz franchise system*

Petitioner MBNA is the exclusive United States distributor of Mercedes-Benz automobiles and genuine replacement parts. Mercedes-Benz automobiles enjoy a reputation for excellence, a history of engineering superiority, and a public perception of the highest quality. C.A. App. 927-32. They consistently rank at or near the top among all automobiles in the United States in consumer satisfaction. C.A. App. 2217-18.

MBNA distributes Mercedes-Benz automobiles and genuine parts through approximately 400 franchised dealers located throughout the United States. C.A. App. 1220-21, 1230-32. Each of MBNA's dealers enters into a franchise agreement with MBNA containing certain standard provisions, including paragraph 9(C), which reads as follows:

> Dealer shall neither sell nor offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by Daimler-Benz if such parts are necessary to the mechanical operation of such MB passenger cars.

The district court concluded, and the jury was instructed, that this provision precluded dealers from buying replacement parts for Mercedes-Benz automobiles from sources other than MBNA. C.A. App. 4326-27, 4329.

MBNA purchases the great bulk (80%) of its replacement parts from its parent, Daimler-Benz Aktiengesellschaft ("Daimler-Benz"). Daimler-Benz makes one-half of the parts used in the manufacture and repair of Mercedes-Benz automobiles. Daimler-Benz purchases the other half from German original equipment manufacturers (OEM's) who undertake to comply with its specifications. C.A. App. 1819-20. All replacement parts manufactured or purchased by Daimler-Benz undergo a quality control inspection. Daimler-Benz removes a predeter-

mined number of parts at random from each shipment of parts and subjects those samples to stringent testing. If a sample part fails the inspection process, the entire shipment is rejected. During the time period at issue in this suit, Daimler-Benz annually rejected an average of more than 47,000 shipments of parts from OEM suppliers for quality reasons. C.A. App. 1814-20. MBNA purchases the remaining 20% of its replacement parts directly from the same German OEM manufacturers that supply parts to Daimler-Benz. These parts do not undergo Daimler-Benz's quality control examination in Germany, but all of them are subject to the MBNA warranty. C.A. App. 1387-88.

The MBNA franchise system has proven its effectiveness in the marketplace. When originally established in 1965, MBNA sold only 12,000 cars per year, representing one-tenth of one percent (0.1%) of the United States automobile market. C.A. 1218-19. By 1981, its annual sales exceeded 50,000, about one-half of one percent (0.5%) of the market. C.A. App. 1266-67. MBNA currently sells approximately 90,000 cars annually.

As would be expected, consumers who took their Mercedes-Benz automobiles to authorized Mercedes-Benz dealers for repairs anticipated that the dealers would use genuine Mercedes-Benz parts. C.A. App. 1262-63, 1324-25, 1793, 1826, 2220, 2223, 2311, 2356. No evidence suggested that any consumer who patronized a Mercedes-Benz dealer expected or requested the dealer to use parts supplied by another company.

### *3. The generic parts business of Metrix*

Respondent Metrix is an independent wholesaler of replacement parts for imported automobiles. It specializes in the sale of replacement parts for Mercedes-Benz automobiles. Metrix sold parts to independent garages that repair Mercedes-Benz automobiles, and, despite the lan-

guage of the MBNA dealer agreements, it also sold parts to Mercedes-Benz dealers.

Metrix purchased some of those parts from OEM suppliers in Germany that did business with Daimler-Benz and MBNA. It purchased other parts from after-market manufacturers that had no relationship to Daimler-Benz or MBNA. C.A. App. 604-11. Metrix had no procedure for inspecting parts or otherwise controlling their quality. C.A. App. 506-07, 536, 656.

Metrix often sold parts to Mercedes-Benz dealers at prices lower than those of genuine MBNA parts. Because of that price differential, and because the parts sold by Metrix were not easily distinguishable from those sold by MBNA, dealers frequently purchased parts from Metrix and installed them on Mercedes-Benz automobiles. Consumers were generally charged the same price for the Metrix parts as they would have been for genuine parts, and therefore dealers made more profit on such transactions. Dist. Ct. Docket No. 364.

Metrix sold its product by paying commercial bribes and kickbacks to purchasing agents of Mercedes-Benz dealers, a system that it euphemistically termed an "incentive" program. The Fourth Circuit held that this commercial bribery violated the Robinson-Patman Act. *Metrix Warehouse, Inc.* v. *Daimler-Benz AG.*, 716 F.2d 245 (4th Cir. 1983). Metrix's commercial bribery scheme has since been enjoined by the district court. Dist. Ct. Docket No. 353.

After first selling mainly to Mercedes-Benz dealers, Metrix shifted its attention to independent garages. This shift paralleled a substantial growth in the number of independent garages repairing Mercedes-Benz automobiles. During the relevant time, the number of independent garages and the percentage of repairs to Mercedes-Benz cars performed by independent garages increased substantially. Metrix shared in the growth of the in-

dependent garages. Although Metrix's sales to Mercedes-Benz dealers decreased, its total sales increased dramatically as it turned its sales efforts to the growing number of independent garages. C.A. App. 601-03, 613-14.

*4. The Mercedes-Benz warranty for replacement parts*

MBNA warrants that all genuine parts sold to consumers are free of defects in materials and workmanship. In the event of a defect, a consumer is entitled to pursue his warranty claim at any one of MBNA's 400 franchised dealers, all of which are obligated to replace or repair the defective part without cost to the consumer. The dealer, in turn, receives payment from MBNA for the part and for the dealer's costs in making the warranty repair, including labor charges. C.A. App. 1698-99.

By contrast, Metrix provided no written warranty during much of the time period at issue here. When it finally offered a warranty, the warranty reimbursed dealers only for the price of the part; it did not pay any labor or other charges. C.A. App. 1701-04. Metrix had no dealers of its own. Therefore, if a customer somehow discovered that a Metrix part had been used in the repair of his Mercedes-Benz automobile, he was obliged to return to the MBNA dealer that installed the part to make a claim under Metrix's inferior warranty.

In practice, however, Metrix's warranty was irrelevant. MBNA could not readily separate its own genuine parts from the generic parts sold by Metrix, and therefore when Metrix parts proved to be defective, MBNA dealers submitted the warranty claims to MBNA rather than Metrix. C.A. App. 744-49, 1430-40, 2653-54. Despite the high volume of its sales and its lack of quality inspection procedures, Metrix received only "three or four" warranty claims during its entire existence. C.A. App. 585.

### B. The Underlying Lawsuit

#### 1. *Proceedings in the district court*

Metrix sued MBNA in 1979, claiming that paragraph 9(C) of MBNA's franchise agreement violated Section 1 of the Sherman Act; it later characterized its complaint as alleging both an illegal "tie-in" and an unreasonable restraint of trade. MBNA moved for summary judgment on Metrix's Section 1 claims, asserting that this Court's decision in *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936), *affirming* 80 F.2d 641 (7th Cir. 1935), provided a complete defense for the franchise requirement. The district court first denied, then granted, MBNA's motion, and then vacated the latter ruling and set the case for trial.

At trial, MBNA submitted detailed evidence showing that the challenged franchise provision had valid, procompetitive business justifications. First, the provision was necessary to ensure that consumers received the factory-approved and warranted parts they expected to receive; second, the provision was necessary to prevent dealers (and Metrix) from free-riding on MBNA's warranty; and third, the provision was a reasonable measure to foster product quality and protect the goodwill created by MBNA and Daimler-Benz. At the close of Metrix's case, and at the close of all the evidence, MBNA moved for a directed verdict, again urging that its action had a lawful business justification as established by this Court in *Pick*. The district court denied these motions. C.A. App. 1297-98.

Over MBNA's objection, the district court instructed the jury that "a tying agreement can be justified only if there is no less restrictive alternative reasonably available" to accomplish a franchisor's procompetitive objective. C.A. App. 2707-08, 2802. The jury subsequently returned a verdict against MBNA, finding it liable to Metrix under Section 1 of the Sherman Act and award-

ing treble damages of more than $7 million. C.A. App. 2815.

Following the grant of a new trial on the limited issue of the amount of damages, the district court certified for interlocutory appeal the question whether MBNA's conduct was justified under the *Pick* doctrine. It framed the question in the following terms (App., *infra*, 41a-42a):

> Would it have been reasonable as a matter of law for Mercedes-Benz to have required its dealers to purchase replacement parts only from Mercedes-Benz when such parts are intended to be integrated into Mercedes-Benz automobiles and when such dealers are franchised to sell Mercedes-Benz products and repair Mercedes-Benz automobiles under the Mercedes-Benz mark and logo?

The district court noted that "[b]ecause the *Pick* issue is dispositive of the Sherman Act claim and because the facts in this case are virtually identical to those in *Pick*, an immediate determination of its applicability by the Court of Appeals will advance the ultimate termination of the litigation." *Id.* at 36a.

***2. The decision of the Fourth Circuit***

On appeal, the Fourth Circuit held that MBNA was not entitled to rely on *Pick* and that MBNA had no valid business justification for its franchise agreement. The court initially concluded that *Pick* should be viewed as a narrow, fact-bound decision. App., *infra*, 11a-12a. It also concluded that *Pick* constituted an obsolete precedent that "predated the application of per se rules to tying arrangements by more than ten years." *Id.* at 12a-13a.

The Fourth Circuit next considered each of MBNA's business justifications. Although it did not question the legitimacy of MBNA's concern for satisfaction of consumer expectations, avoidance of free-riding, and quality control, and although it did not doubt that the restraint would foster these procompetitive objectives, the court of appeals nonetheless concluded that MBNA could not as-

sert a business justification defense because "means less restrictive" than the contractual restraint were available. App., *infra*, 13a. The court below made no effort to analyze the effectiveness and feasibility of the "alternatives" that it hypothesized; instead, it repeatedly stated that the evidence "suggests" their availiability. *Id.* at 15a.

On this basis, the Fourth Circuit surmised that MBNA could satisfy consumer expectations simply by requiring its dealers to tell customers that the parts used in repair work were not genuine; it could prevent free-riding on warranties by stamping MBNA's parts with identifying numbers; and it could assure quality control and maintain goodwill through specification of standards to suppliers. App., *infra*, 14a-16a. Having concluded that MBNA's procompetitive business objectives could be achieved by these hypothetical alternative means, the court rejected MBNA's business justification defense and affirmed the jury's finding of Sherman Act liability. *Id.* at 17a.

## REASONS FOR GRANTING THE PETITION

The decision of the Fourth Circuit, holding that MBNA violated the federal antitrust laws by requiring that its franchised dealers use genuine MBNA replacement parts, conflicts directly with this Court's decision in *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936), *affirming* 80 F.2d 641 (7th Cir. 1935). It clashes with rulings in other circuits upholding business justification defenses in situations that cannot be distinguished from the present case. And it also runs afoul of the standard prescribed by the Department of Justice for tie-ins affecting replacement parts in its 1985 *Vertical Restraints Guidelines*.

The Fourth Circuit's hostility to restraints designed to ensure quality control falls with particular force on small franchisors that rely on product quality to compete with larger rivals. MBNA has utilized the challenged provi-

sion in its franchise contracts to gain and maintain a procompetitive foothold—almost 1% of the national market—in automobile sales. What it offers to the public, quite simply, is superior quality—a public benefit that depends on meticulous supervision of the products, components, and services offered by its franchised dealers. The Fourth Circuit's rejection of MBNA's business justification for its requirement that dealers utilize genuine, high-quality replacement parts therefore has a palpably injurious impact on MBNA's ability to engage in vigorous interbrand competition.

This Court frequently has observed that the federal antitrust laws are intended to foster interbrand competition and to protect the interests of consumers. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The Court also has made clear that the antitrust laws are not concerned with nonprice restraints on middlemen, or others in the chain of distribution, unless the restraints also adversely affect competition at the end-user level. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Fourth Circuit's decision ignores these basic tenets. The court of appeals failed to consider the procompetitive effects of the franchise provision and the absence of any adverse effect on consumers; it instead relied heavily on a wooden "less restrictive alternative" approach disfavored by modern antitrust theory. Further review is plainly warranted.

## I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH RULINGS OF THIS COURT AND SEVERAL OTHER CIRCUITS ON AN IMPORTANT ISSUE OF ANTITRUST LAW.

### A. The Fourth Circuit's ruling conflicts with the *Pick* doctrine.

In the lower courts, MBNA justified its franchise requirement by relying on this Court's decision in *Pick*

*Mfg. Co.* v. *General Motors Corp.*, *supra*. The Fourth Circuit held, however, that "*Pick* does not establish the reasonableness of MBNA's tying arrangement" because *Pick* "predated the application of per se rules to tying arrangements." App., *infra*, 12a-13a. Thus, in the Fourth Circuit's view, *Pick* has not "endured the evolution of tie-in analysis." *Id.* at 12a n.11. This announcement of the demise of *Pick* is not merely exaggerated; it is completely wrong.

As the district court observed when certifying this case for interlocutory appeal, "[t]he material facts in this case are virtually identical to those in *Pick*." App., *infra*, 35a. In *Pick*, a distributor of automobile replacement parts alleged that General Motors had violated the antitrust laws by requiring its franchised dealers to use only genuine General Motors replacement parts. The Seventh Circuit sustained the franchise arrangement. 80 F.2d at 642-643. It stated that "[d]efective parts, preventing efficient operation of cars, bring dissatisfaction with the automobiles themselves. The natural result is blame of the manufacturer and consequent loss of sales." *Id.* at 643. The Seventh Circuit further stated that because the manufacturer warranted its vehicles, the contractual arrangement was an "entirely appropriate and legitimate" method of policing warranty claims. *Id.* at 642. It accordingly concluded that the challenged restraint served to "protect [manufacturers] in their warranties of automobiles and in their continued sale thereof with the intent to promote and preserve the good will of the purchasing public, essential to business success; and [does] not and will not lessen competition substantially." *Id.* at 644.

Following briefing and argument, this Court affirmed the Seventh Circuit's decision *per curiam*, 299 U.S. 3 (1936), ruling that the effect of the challenged contractual provision "had not been in any way substantially to lessen competition." *Id.* at 4. The Court thus agreed that an automobile distributor's efforts to protect con-

sumer goodwill and prevent free-riding on its warranties by requiring dealers to use only genuine replacement parts cause no material harm to competition and do not violate the antitrust laws.

This Court's most recent tie-in decision, *Jefferson Parish Hospital District* v. *Hyde*, 466 U.S. 2 (1984), demonstrates the continuing vitality of the *Pick* doctrine. The majority opinion in *Hyde* recognized that "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively." *Id.* at 12. Four Justices, concurring in *Hyde*, elaborated on this proposition in their review of the legal principles governing tie-ins, including so-called "affirmative defenses." They noted that tie-ins have been justified by past decisions of the Court where needed to "protect[] the seller's business reputation." *Id.* at 34 n.1. They also observed that tie-ins can "protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction." *Id.* at 41. For that proposition, the concurring opinion in *Hyde* cited this Court's decision in *Pick*. See also *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 607 (1953) (citing *Pick* for the proposition that tie-ins are sustainable where reasonably necessary for "protecting the good will" of branded products).

In contrast to the Fourth Circuit, other courts of appeals have recognized that *Pick* remains good law. For example, in *Susser* v. *Carvel Corp.*, 332 F.2d 505, 517 (2d Cir. 1964), cert. dismissed, 381 U.S. 125 (1965), the court cited *Pick* in support of its holding that a franchisor of ice cream stores could require franchisees to refrain from selling products of other manufacturers because this was "reasonably necessary for the protection of . . . goodwill." Similarly, in *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 938 (3d Cir.), cert. denied, 400 U.S. 831 (1970), the court cited *Pick* in support of the validity of "tie-in agreements designed to protect against war-

ranty claims." Likewise, in *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790, 808 (M.D.N.C. 1957), affirmed, 252 F.2d 441 (4th Cir. 1958), the court cited *Pick* for the proposition that Ford "had the undoubted right to require plaintiff not to sell as genuine parts any parts that were not genuine, and might have required plaintiff to use only parts and accessories supplied by Ford." And in *IAP, Inc.* v. *Mercedes-Benz of North America, Inc.*, 571 F. Supp. 262, 268 (D.N.J. 1983), the court relied on *Pick* to sustain MBNA's franchise system against an allegation of unlawful tying, noting that lower courts must "adhere to the [*Pick*] ruling 'unless and until the Supreme Court should instruct otherwise.'"

The rule of *Pick* and its progeny is stated in the Department of Justice's 1985 *Vertical Restraints Guidelines* in the following terms (*id.* at § 5.1):

> Tying arrangements often serve procompetitive or competitively neutral purposes. One procompetitive use is to protect the integrity or reputation of a product. Where the manner in which purchasers use a product may affect a manufacturer's reputation and future sales, the manufacturer may ensure that the purchaser maintains desired standards by tying the sale of the product to a maintenance contract or to sales of "approved" parts, and thus reduce the risk of inferior service by distributors.

Because the facts in this case are virtually identical to those in *Pick*, and because the *Pick* doctrine is an integral part of contemporary antitrust jurisprudence, the decision of the Fourth Circuit rejecting MBNA's business justification defense conflicts directly with a controlling decision of this Court.

**B. The *Pick* doctrine has generated substantial confusion in the lower courts.**

Despite the fact that this Court has never questioned the continuing validity of *Pick*, other courts, including the Fourth Circuit, recently have done so. It is essential

for this Court to provide guidance to the lower federal courts by reaffirming the *Pick* doctrine. The confusion created by this issue and the resulting burden on the federal judiciary are well described in the district court's opinion certifying this nine-year old antitrust case for interlocutory appeal (App., *infra*, 36a):

> Three private suits have been brought recently against Mercedes-Benz based on Mercedes' parts policies, and all three courts have resolved the *Pick* question differently. Judge Biunno approvingly cited *Pick*, dismissing one suit. *IAP, Inc.* v. *Mercedes-Benz of North America, Inc.*, 571 F. Supp. 262 (D.N.J. 1983). Judge Patel rejected the *Pick* exception, except to shed light on the business justification defense. *Mozart Co.* v. *Mercedes-Benz of North America, Inc.*, 593 F. Supp. 1506, 1512 (N.D. Cal. 1984). This Court originally rejected *Pick*, *Metrix Warehouse, Inc.* v. *Daimler-Benz A.G.*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D. Md. 1982), subsequently reconsidered and followed *Pick*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D. Md. 1983), and finally reinstated its earlier position, 1984-2 Trade Cas. (CCH) ¶ 66,226 (D. Md. 1984).

These contradictory opinions as to the continuing vitality of *Pick* not only have imposed a significant burden on the federal judiciary, but also have led to substantial uncertainty and disruption of MBNA's franchise system. The practical dilemma faced by MBNA appears from comparing the Fourth Circuit's decision in the present case—which summarily rejected MBNA's business justification defense—with the Ninth Circuit's subsequent decision in *Mozart Co.* v. *Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987)—which accepted the defense. Despite placing a high burden of demonstration on MBNA, the Ninth Circuit upheld MBNA's business justification defense in all respects (*id.* at 1349, 1351):

> The justification asserted by MBNA is that the tying arrangement is necessary to assure quality control and to protect its goodwill. The difficulty confronting MBNA is the problem of 'freeriding' by Mercedes dealers. To MBNA it is crucial that a dealer operating under a franchise distribution arrangement offer standardized products. Only then can customers confidently rely on the Mercedes name.
>
> * * * * *
>
> Mozart is right, of course, when it insists that MBNA could have furnished design specifications for Mercedes replacement parts. That alone, however, does not eliminate the business justification defense. . . . We do not believe MBNA was required as a matter of law to take such extreme steps to protect its legitimate interest in assuring public confidence in the quality of its trademarked product.

The Fourth Circuit's rejection of MBNA's business justification defense casts a long shadow over franchise systems in all industries. The decision below throws into doubt the utility of exclusivity provisions in any franchise relationship, no matter how vital exclusivity may be to effective interbrand competition. It is thus inimical to the procompetitive policies served by the antitrust laws in the field of vertical restraints. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977).

**C. The Fourth Circuit's "less restrictive alternative" rationale conflicts with modern antitrust jurisprudence.**

The Fourth Circuit thought it possible to bypass the *Pick* doctrine and reject MBNA's proffered business justification without *any* economic analysis of the procompetitive purposes served by the challenged restraint. Instead, the court found it sufficient that the evidence "suggests" that MBNA might "have satisfied its customers' expectations through less-restrictive means." App.,

*infra*, 15a. This, we submit, is a sterile exercise in labelling, and one that is dangerously out of step with antitrust principles declared by this Court and other circuits. It is inconceivable that a commercially valuable and procompetitive provision in a franchise agreement—a provision identical to that sustained by this Court in *Pick*—could be invalidated and the franchisor penalized with treble damages on the basis of such rhetorical and speculative characterizations.

Experience in antitrust litigation confirms that, in nearly every case, litigants attacking distributional restraints are able to speculate about the existence of hypothetical "alternatives" that they believe would be "adequate" to serve the manufacturer's business purposes. But as the Department of Justice pointed out in its *amicus curiae* brief in *Hyde*, these conclusory assertions clash with modern antitrust jurisprudence, which looks to economic substance rather than verbal characterizations. In words that apply directly here, the Department noted (No. 82-1031 at 15-16 n.19):

> While the clear availability of [less restrictive] alternatives is a relevant factor in determining the existence of either anticompetitive intent or effect, it does not in itself prove that the means selected were either unreasonable or anticompetitive. The court of appeals' use of the rule would make firms "guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests" [quoting *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975)].

Indeed, a search for hypothetical alternatives is most chilling to the competitive process when the challenged

restraint affects only franchisees and leaves *consumer* choice unlimited. As the concurring Justices noted in *Hyde*, 466 U.S. at 44 n.13, "[i]n the absence of an adequate basis to expect any harm to competition from [a] tie-in, [an] objection [that a purported benefit could have been achieved by less restrictive means] is simply irrelevant." Unless courts ignore *Sylvania*'s admonition not to equate competition on the merits with "the autonomy of independent businessmen" (433 U.S. at 53 n.21), there is no basis to expect harm to competition from the types of exclusivity requirements typically found in franchise agreements. Consequently, there is no reason to seek alternatives that are less restrictive of the freedom of franchisees.

Other courts have accepted business justification defenses for tie-ins when fairly related to the achievement of a valid business purpose despite the presence of conjectural arguments about reasonably available alternatives. See, *e.g.*, *Susser*, 332 F.2d at 520, where Judge Friendly observed that even though "Carvel was able to specify [the desired product qualities] to its source of supply, whose product it regularly checked, [that] does not show that administration could be confided to 400 dealers." Accord, *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 557 (E.D. Pa. 1960), affirmed, 365 U.S. 567 (1961). Instead of speculating about the adequacy of less restrictive alternatives, these courts have focused on the ultimate economic question whether "the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller." *Hirsh* v. *Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1348 (9th Cir.), cert. denied, 459 U.S. 973 (1982). See also *Sylvania*, 433 U.S. at 58 n.29 (the vertical "restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used. But we agree with the implicit judgment in *Schwinn* that a *per se* rule based on the nature of the restriction is, in general, undesirable").

Similarly, modern antitrust scholarship is virtually unanimous in repudiating the mechanical less restrictive alternative rationale adopted by the Fourth Circuit here, particularly when the restraint falls on franchisees and not on consumers. See, *e.g.*, R. Bork, *The Antitrust Paradox* 380 (1978) (discussing the need for a business justification defense to tie-in allegations and noting that the less restrictive alternative rationale is defective because "[t]here is no showing that these alternative routes will be as effective as the tie-in of the related product, or that they will accomplish the result as inexpensively"); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 11-12 (1977) (describing the value of tie-ins in assuring quality control in franchises and criticizing the less restrictive alternatives doctrine); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 9 (1984) (criticizing judicial insistence on "alternatives" to tie-ins and noting that "[e]verything has its alternatives"); P. Areeda, VII *Antitrust Law* ¶ 1505, at 388 (1986) (observing that "refined comparisons among alternatives are usually impossible" and that courts should only ask whether the restraint is "'reasonably necessary' to achieve a legitimate objective"). Accord, Klein and Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345, 349 (1985); Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1277-1278, 1282-1283 (1980); Markovits, *Tie-Ins and Reciprocity, A Functional, Legal, and Policy Analysis*, 58 Tex. L. Rev. 1363, 1382 (1980). See also ABA Antitrust Section, Monograph No. 8, *Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others*, 19-20 (1982) (noting the increasing unwillingness of federal courts to engage in "speculation" about the adequacy of "less restrictive alternatives" to achieve valid business purposes).

The Fourth Circuit's invocation of the less restrictive alternative rationale to circumvent this Court's decision

in *Pick* thus brings its ruling into conflict with the weight of judicial and scholarly opinion on an important and recurring antitrust issue. This Court should grant review to clarify the standard that applies to evaluate business justification defenses of the kind proffered by MBNA.

## II. THE FOURTH CIRCUIT'S DECISION ERRONEOUSLY CONSTRUES THE SHERMAN ACT.

If the Fourth Circuit had applied correct principles of antitrust law, it would have reversed the district court's decision. MBNA's contractual provision requiring its franchised dealers to use genuine replacements parts unquestionably serves valid business objectives that promote interbrand competition and enhance consumer choice.

### A. MBNA has a valid business justification for its requirement that franchised dealers use genuine MBNA replacement parts.

Far from being an archaic "exception" to modern principles of antitrust law, as the Fourth Circuit assumed (App., *infra*, 11a), the *Pick* doctrine exemplifies the consumer-oriented, efficiency-based antitrust jurisprudence that has characterized this Court's most recent decisions. *Pick* reflects the fact that it is "inappropriate to condemn" an alleged tying arrangement without "considerable inquiry" into its "procompetitive justifications." *NCAA* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984). "If the competitive consequences of [the] arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label." *Hyde*, 466 U.S. at 21 n.34. The antitrust laws do not condemn practices that can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). These are the principles that underlie the *Pick* doctrine, and they are critically important to the maintenance of vigorous interbrand competition in the franchise context.

There is only one difference between this case and *Pick*, and that difference weighs heavily against the decision of the court below. In *Pick*, this Court upheld restraints utilized by the largest automobile manufacturer in the nation, whereas the restraint in this case is utilized by a company with less than 1% of automobile sales and less than 2% of dealerships nationwide. See pages 2-5, *supra*. In all other material respects, this case is identical to *Pick*. Here, as in *Pick*, the challenged provision ensures that consumers receive the genuine replacement parts they expect when they patronize a franchised dealer; it protects MBNA and the consuming public by ensuring that parts furnished to consumers are subject to the MBNA warranty; and it protects consumers against dealers who "free ride" on the reputation of the franchisor by palming off inferior replacement parts. Here, as in *Pick*, no consumer is restrained in obtaining replacement parts. Consumers may patronize either MBNA dealerships or a variety of repair shops and garages. C.A. App. 1950-52. The only parties "restrained" by the challenged provision are MBNA dealers themselves, who voluntarily enter into the franchise agreement cognizant of the manufacturer's obviously "legitimate reason . . . to exert control over the manner in which his products are sold and serviced." *Sylvania*, 433 U.S. at 55 n.23.

The economic premise of *Pick* and its progeny, including the Ninth Circuit's recent decision in *Mozart*, 833 F.2d at 1348-1351, is that a franchise system constitutes a "commercial partnership" (*Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 466 (1985)), in which the collective goodwill of franchisees is integrated contractually with that of the franchisor for the purpose of increasing output. "The contractual integration achieved in franchising systems frequently includes a shared identity that allows a system of largely independent entrepreneurs to enjoy certain of the advantages of large-scale, multiple-outlet firms." Baker, *supra*, 66 Va. L. Rev. 1252-1253.

The central purpose of any franchise system is the sale of a primary product—in this case, Mercedes-Benz automobiles. Like other nonprice vertical restraints, exclusive-purchasing requirements that are ancillary to that procompetitive purpose (because they contribute to its efficiency) are lawful mechanisms that serve the Sherman Act's goal of increased competition and consumer welfare. The ancillary character of restraints relating to the service and repair of a primary product is beyond dispute. See *Sylvania*, 433 U.S. at 55:

> Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

As *Pick* demonstrates, a restraint that is reasonably ancillary to such a procompetitive objective of the franchisor should be sustained without a speculative (and ultimately question-begging) inquiry into "less restrictive alternatives." Because less restrictive alternatives *always* can be hypothesized, such an inquiry reflects indiscriminate hostility to *all* tie-ins regardless of their procompetitive virtues.

Moreover, in determining whether competition has been adversely affected, the proper focus is on the freedom of consumers, not franchisees or those who wish to sell generic replacement parts to franchisees. It is consumers "whose interests the [Sherman Act] was especially intended to serve." *Hyde*, 466 U.S. at 15. An antitrust policy that focuses on the "autonomy of independent businessmen" rather than the consuming public is "an antitrust policy divorced from market considerations" and

one that lacks "any objective benchmarks." *Sylvania*, 433 U.S. at 53 n.21. If, as in this case, competing suppliers and retailers outside the franchise system offer consumers ready access to a tied product's generic equivalent, then consumers will patronize the franchise system only if they find the restraint beneficial.

The procompetitive benefits of vertical restraints of the kind approved in *Pick* have been recognized consistently by academic commentators. Judge Posner has observed that "[f]ranchise tie-ins are methods . . . of promoting interbrand competition by assuring quality control and product and service uniformity." Posner, *supra*, 45 U. Chi. L. Rev. at 11-12. That view finds support in a wealth of other studies. See, *e.g.*, Klein & Saft, *supra*, 28 J.L. & Econ. at 349 ("franchise arrangements create an incentive for franchisees to shirk on quality. This means that the franchisor must police the franchisees. Within such a realistic economic context, tie-in contracts are likely to be efficient policing devices"); Markovits, *supra*, 58 Tex. L. Rev. at 1436 ("quality control tie-ins . . . almost always will be allocatively efficient"); Baker, *supra*, 66 Va. L. Rev. at 1257 ("[t]ying is an effective response to concerns over quality control").

But the benefits from MBNA's franchise provision are not merely matters of economic theory. The uncontroverted evidence at trial—evidence cited to the Fourth Circuit in this appeal—clearly demonstrates the beneficial effect on interbrand competition. Since Daimler-Benz authorized MBNA to distribute its automobiles in the United States in 1965, MBNA's share of the market has increased consistently, rising to approximately 1% of the national total at the time of trial. C.A. App. 1266-67. Mercedes-Benz consistently has finished at or near the top in consumer satisfaction polls. C.A. App. 2217-18. In this context, the "most reasonable inference is that a persistent practice is persistently beneficial to consumers." Easterbrook, *supra*, 63 Tex. L. Rev. at 33. Thus, because

MBNA's franchise system "involves a union of . . . enterprise to carry on a useful business. the challenged agreements are ancillary in that they enhance the efficiency of that union by eliminating the problem of the free ride, and, given the [defendant's] small market share, the agreements cannot be part of a plan to gain monopoly control of the market." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 107 S. Ct. 880 (1987).

At the same time, the uncontroverted evidence, paralleling that in *Pick* (80 F.2d at 644), shows an explosive growth in the number of independent garages and repair shops that specialize in the repair of Mercedes-Benz automobiles and that are able to provide consumers with generic replacement parts outside the MBNA franchise system. C.A. App. 611-12. By the time of trial, these outlets outnumbered MBNA franchisees by nearly ten to one and had increased their share of nonwarranty repairs performed on Mercedes-Benz cars from 50% in 1968 to 70%. C.A. App. 1950-52. The record also shows that MBNA dealers who succumbed to temptation to purchase generic parts and palmed them off on consumers were not engaged in "competition on the merits." These generic parts were sold to the dealers through commercial bribery (App., *infra*, 3a & n.3)—a corrupt practice that unquestionably subverts the integrated goodwill of MBNA and its franchisees.

**B. MBNA has no "less restrictive alternative" that adequately serves its valid business objectives.**

Because the challenged restraint was reasonably ancillary to MBNA's procompetitive business goals, and because the restraint had no adverse effect on competition at the consumer level, the antitrust inquiry should be at an end. There is no need to speculate about the adequacy of hypothetical "less restrictive alternatives"

to achieve those business objectives. But even assuming the propriety of undertaking a "less restrictive alternative" inquiry, the Fourth Circuit's reasoning is plainly in error and inconsistent with settled principles of antitrust law.

1. The evidence at trial showed that consumers who patronize franchised MBNA dealers for automobile repairs do so with the expectation that they will receive only "genuine" Mercedes-Benz parts—that is, parts supplied through the MBNA system that are fully backed and warranted by MBNA and its nationwide network of dealers. See page 5, *supra*. Because MBNA neither backs nor warrants parts sold by other suppliers, legitimate consumer expectations can be satisfied only if dealers utilize "genuine" replacement parts as required by MBNA.

The court of appeals brushed aside these consumer preferences because, it believed, MBNA could dicker with consumers and persuade them to purchase genuine products if they had "intrinsic superiority." App., *infra*, 15a. This purported "alternative" ignores the uncontroverted evidence that consumers expect genuine parts at MBNA's dealerships and therefore freely exercise their choice between genuine and nongenuine parts and service by patronizing franchised MBNA dealers in the first instance. Any consumers who are unconcerned about obtaining genuine parts are free to patronize a multitude of local repair shops and gasoline stations, a choice that approximately 70% of consumers made at the time of trial. C.A. App. 1950-52. Those who elect to patronize franchised MBNA dealers, on the other hand, fully expect to receive the "tied" product supplied by MBNA. Thus, "[t]o prevent the franchisor from forcing franchisees to use only company products would prevent consumers from effecting their market choices." *Klamath-Lake Pharmaceutical Ass'n* v. *Klamath Medical Service Bureau*, 701 F.2d 1276, 1290 n.14 (9th Cir. 1983), cert. denied, 464 U.S. 822 (1984).

The Fourth Circuit also reasoned that goodwill is as important to dealers as to MBNA, and, accordingly, that dealers would "voluntarily" purchase MBNA parts on an exclusive basis "if they considered it necessary to ensure consumer goodwill." App., *infra*, 15a n.15. This reasoning completely ignores the "free rider" phenomenon discussed in *Sylvania*, 433 U.S. at 55. As the Ninth Circuit pointed out in *Mozart*, 833 F.2d at 1349, MBNA's contractual requirement avoids a "conflict of interest" that threatens to undermine the integrity of the entire franchise system:

> True, [dealers] wish to maintain the goodwill of MBNA, but some will yield to avarice and increase their profits by supplying inferior products while continuing to attract customers at the expense of those dealers who conform to the quality standards. . . . Although a consumer may realize that a particular franchisee "cut the corner," the adverse reaction of consumers as a group is not confined to that particular franchisee because they are appropriately reacting to the poor job of policing done by the franchisor.

MBNA's challenged provision therefore serves to protect consumers from unscrupulous practices that ultimately are harmful to the franchise system nationwide. The contrary reasoning of the Fourth Circuit exposes consumers to "palming off" and effectively restores the discredited doctrine of *caveat emptor*. "The antitrust laws, however, are not designed to facilitate such a fraud upon the consumer." *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 n.15 (9th Cir. 1982).

2. MBNA's exclusive dealing requirement not only protects consumer goodwill by providing genuine parts to those who expect to receive them, but also protects both MBNA and consumers against fraudulent warranty practices. The Fourth Circuit nonetheless reasoned that MBNA could adequately eliminate warranty fraud by

"stamping, inscribing, or numbering" its replacement parts to permit identification. App., *infra*, 16a. This reasoning is riddled with errors.

Consumers take automobiles to repair shops and dealers not for parts as such, but for repairs. A Mercedes-Benz owner who takes his car to an authorized dealer does so with the expectation that the repair—that is, provision of the replacement parts and necessary labor—will be warranted by MBNA and that the warranty will be honored by any of the 400 Mercedes-Benz dealers nationwide. MBNA's warranty covers 100% of the costs associated with replacement of parts sold by MBNA. Metrix's warranty, when it had one, was vastly inferior —the minimum required by law. See page 7, *supra*.

MBNA's warranty system can work fairly and efficiently only if dealers honoring the warranty know they will be reimbursed by MBNA for parts and labor. MBNA cannot, of course, be expected to warrant parts it does not sell; the court of appeals acknowledged that MBNA "may protect itself against unfounded warranty claims." App., *infra*, 16a. But to protect itself in this manner, MBNA needs a mechanism to ensure that it does not pay claims on replacement parts not covered by its warranty, a function performed efficiently by the challenged exclusivity provision.

The Fourth Circuit speculated that MBNA could "mark" its parts to identify them and thereby avoid paying fraudulent warranty claims on defective parts sold by others and palmed-off as "genuine." This proposal, however, is not an "alternative" at all. The product-numbering system suggested *sua sponte* by the court (App., *infra*, 16a) is a longstanding actual practice of MBNA that has *not* prevented warranty fraud. Ironically, Metrix had argued that MBNA's practice of product numbering, which the Fourth Circuit deemed to be a "less restrictive alternative," was in fact an example of unlawful exclusionary conduct. Dist. Ct. Docket No. 364.

Reliance on a numbering system is unavailing for a still more important reason, and one that is central to the proconsumer policies of the antitrust laws. Dealers cannot feasibly tell consumers that determination of warranty coverage must await the time-consuming and inconvenient process of disassembly and inspection of their automobiles—at least not more than once. In the consumer's view, the fact that the parts were installed by an authorized MBNA dealer is enough. The Fourth Circuit's suggested numbering system, which presupposes a time-consuming part-by-part examination to detect warranty fraud, is therefore plainly at odds with both the welfare of consumers of Mercedes-Benz products and MBNA's undoubted right to protect itself against unethical practices through efficient and effective means.

3. In addition to satisfying consumer expectations and averting fraudulent warranty practices, the contractual provision attacked by Metrix makes a significant contribution to quality control. By requiring dealers to utilize only genuine MBNA replacement parts, MBNA effectively screens out a variety of substandard and defective replacement parts that provoke consumer dissatisfaction. C.A. App. 1811-15. The Fourth Circuit nonetheless reasoned that MBNA's business purpose could be served by issuing "specifications" to manufacturers of generic replacement parts. In so reasoning, the court disparaged the utility of replacement part "testing" by MBNA's parent company, Daimler-Benz, which supplies most of the genuine Mercedes-Benz replacement parts utilized by MBNA dealers. App., *infra*, 14a & n.13.

Daimler-Benz inspects the replacement parts that MBNA sends to dealers in the United States, a review process that results in a rejection of 47,000 shipments of defective parts every year. C.A. App. 1814-15. The Fourth Circuit discounted the importance of this inspection system by noting that MBNA purchases only 80% of its parts from Daimler-Benz, and by illogically reason-

ing that, if MBNA can dispense with Daimler-Benz's inspection of 20% of its parts, then the inspection program must be a business irrelevancy that might as well be abandoned. App., *infra*, 14a & n.13.

There is, of course, a vast difference between a policy of 80% inspection and one of no inspection. It is impossible to conclude that MBNA lacks a valid business justification for its present distribution system simply because it subjects to intensive testing in Germany the vast bulk (rather than all) of the replacement parts used in its automobiles. The necessary quantum of testing is preeminently a question of business judgment. Indeed, the procompetitive impact of MBNA's existing quality control requirements is evident from the fact that, despite the small size of MBNA as a market participant, genuine Mercedes-Benz products and services consistently score extremely well, and often finish first, in consumer satisfaction polls (C.A. App. 2217-18).

In sum, as the Ninth Circuit correctly concluded, "MBNA maintains an excellent reputation in the automobile industry for reliable service and quality replacement parts. . . . [T]he only feasible method for maintaining quality control is the use of the tying arrangement." *Mozart*, 833 F.2d at 1351. By contrast, the compulsory generic-parts regime ordained by the Fourth Circuit needlessly and unwisely places antitrust and consumer welfare at cross purposes. We submit that the Sherman Act neither compels nor authorizes such a perverse result.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1988

# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 86-3522(L)

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METRIX WAREHOUSE, INC.,
*Appellee,*

versus

DAIMLER-BENZ AKTIENGESELLSCHAFT,
*Defendant,*

and

MERCEDES-BENZ OF NORTH AMERICA, INC.,
*Appellant,*

versus

CARL SCHWARTZ,
*Third-Party Defendant.*

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86-3523

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METRIX WAREHOUSE, INC.,
*Appellant,*

versus

DAIMLER-BENZ AKTIENGESELLSCHAFT,
*Defendant,*

and

MERCEDES-BENZ OF NORTH AMERICA, INC.,
*Appellee,*

versus

CARL SCHWARTZ,
*Appellant,*

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On appeal from the United States District Court
for the District of Maryland, at Baltimore
Edward S. Northrop, Senior District Judge—
(CA 79-2066)

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Argued: November 10, 1986

Decided: September 14, 1987

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Before SPROUSE, ERVIN and CHAPMAN, Circuit Judges.

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SPROUSE, Circuit Judge:

Metrix Warehouse, Inc., (Metrix) brought the underlying action in this case against Mercedes-Benz of North America (MBNA) under Section 1 of the Sherman Act.[1] MBNA filed a counterclaim grounded on Section 2(c) of the Robinson-Patman Act.[2] This is an interlocutory ap-

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[1] 15 U.S.C. § 1. The section provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[2] 15 U.S.C. § 13(c). Section 2(c) of the Robinson-Patman Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

peal from three of the district court's rulings in the case.

MBNA is the exclusive franchisor of Mercedes-Benz dealerships in the United States and, among other things, has been responsible for the sale and distribution of Mercedes-Benz replacement parts to its franchised dealers. Metrix, an independent automobile parts distributor, sells Mercedes-Benz replacement parts to independent garage repair shops and, when it can, to Mercedes-Benz dealers. MBNA's franchise agreements with its dealers, however, required the dealers to buy Mercedes-Benz replacement parts only from MBNA. In its complaint, Metrix claimed that MBNA's enforcement of this requirement was a tying agreement that constituted a per se violation of Section 1 of the Sherman Act or alternatively that it constituted a violation of the Act under the rule of reason. MBNA charged in its Robinson-Patman Act counterclaim that it suffered lost profits as a result of Metrix's "incentive" program, in which Metrix paid cash and prizes to personnel at Mercedes-Benz dealerships to induce them to purchase replacement parts from it.[3]

The jury awarded Metrix approximately $2.3 million in damages ($7,005,930 after trebling) on its Sherman Act claim. It also resolved MBNA's Robinson-Patman Act counterclaim in favor of Metrix finding specifically that MBNA suffered no antitrust injury from Metrix's "incentive" program.

The district court upheld the jury's liability verdict on the Sherman Act claim, but set aside its damage award to Metrix as "contrary to the weight of evidence." The court also granted judgment notwithstanding the verdict

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[3] In a prior interlocutory appeal, we determined that Metrix's "incentive" program constituted a per se violation of Section 2(c) of the Robinson-Patman Act. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 245 (4th Cir. 1983). The factual questions relating to antitrust injury and damages remained for trial.

(or alternatively a new trial) to MBNA on its Robinson-Patman Act counterclaim. It concluded that on the basis of the evidence presented "the jury could not reasonably return a finding of no [antitrust] injury" on the counterclaim. The district court certified questions of law underlying its rulings on both Metrix's claim and MBNA's counterclaim, and we granted both parties' petitions and consolidated them for interlocutory review.[4] We affirm

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[4] As presented by the parties on appeal, and as interpreted by this court, the issues raised by the certified questions are whether *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), established an automobile exception to Sherman Act liability for tying arrangements; whether MBNA proved as a matter of law that its tying arrangement was based on a legitimate business justification; whether the jury's Sherman Act damage award was against the clear weight of the evidence; and whether the district court misapplied the standards for granting a judgment notwithstanding the verdict or, alternatively, a new trial on MBNA's Robinson-Patman Act counterclaim.

In its motion for certification on the *Pick* question, MBNA concentrated solely on the issue of reasonableness as a matter of law, reserving the right to raise other issues on appeal after final judgment. The district court said in its certification order:

> This question addresses an issue which has permeated this case for more than four years; namely, whether the Supreme Court's affirmance in *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936) operates to bar Metrix's claim under § 1 of the Sherman Act. . . .
>
> The *Pick* issue is clearly a controlling question of law for its determination materially effects [sic] the outcome of the litigation.

Our consideration of the Sherman Act liability issue then is limited to this question. The parties on appeal treat the issue as bifurcated, *i.e.*, does *Pick* establish an automobile exception that bars this action and even if not barred as a matter of law did the business justification evidence in this case require a directed verdict for MBNA. MBNA contends that it proved every conceivable element of a business justification defense as delineated by *Pick* and its progeny and was therefore entitled to a directed verdict. MBNA

both the district court's judgment upholding MBNA's Sherman Act liability and its judgment granting a new trial on Metrix's damages. We reverse the district court's judgment on MBNA's counterclaim. We discuss sequentially the issues relating to Sherman Act liability, Sherman Act damages, and the Robinson-Patman Act counterclaim.

## I. Sherman Act Liability

In this interlocutory appeal, we, of course, do not address the ultimate issue of MBNA's Sherman Act liability. The interlocutory question we consider relates to the Supreme Court's decision in *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), and the issue is whether *Pick* established an automobile exception to Sherman Act liability or, if it did not, whether MBNA proved a business justification for its tying arrangement as a matter of law. Since our consideration is limited in this manner, it is not necessary to decide whether Metrix proved the requisite elements of an illegal tying arrangement. An understanding of the interlocutory liability issues, however, requires at least a summary of facts bearing on all the Sherman Act liability issues tried by the district court.

Since 1965, MBNA has been the exclusive franchisor of Mercedes-Benz dealerships in the United States. As a wholly-owned subsidiary of Daimler-Benz Aktiengesellschaft (DBAG),[5] the West German manufacturer of Mer-

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also contends that the district court gave an erroneous instruction on the burden of proving business justification in its rule of reason instructions. Strictly speaking, that contention does not fit into the question certified by the district court, but it approaches sufficiently close to the principal business justification issue that we will determine it.

[5] Originally a named defendant in this case, summary judgment was granted in favor of DBAG and that ruling is not subject to review in this interlocutory appeal.

cedes-Benz vehicles, MBNA has also been responsible for the wholesale distribution of Mercedes-Benz passenger cars and replacement parts to its franchised dealers in this country. At the time of the events in question here, all of the cars and parts MBNA distributed to its dealers were sold pursuant to a standard franchise agreement that it executed with each of its dealers.

Under the terms of the franchise agreement, MBNA retained almost complete control over the allocation of new cars to the dealers. Its relationship with its franchisees, however, was not limited to allocating new cars and overseeing their sale. The agreement required each dealer to establish a customer-service department for the repair of Mercedes-Benz automobiles. It also governed specific repair practices. Most germane to this appeal is Section 9(C) of the agreement, which restricted the dealers' right to choose the source of replacement parts used in the repair of Mercedes-Benz automobiles. Entitled "Quality of Operational Parts Used and Sold by Dealer," this provision stated that:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

At least eight independent wholesale distributors of Mercedes-Benz automobile replacement parts competed with MBNA for the sale of these parts. Metrix was one of these competitors. It had commenced operations in New Jersey in 1969 as an independent wholesale distributor of replacement parts for foreign cars. After three years of selling parts for many different models, Metrix restricted its inventory to "fast-moving" replacement parts for Mercedes-Benz passenger cars.[6] Although

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[6] "Fast-moving" parts are non-warranty, quick-turnover items such as filters, plugs, hoses, and belts. Metrix competed with MBNA

Metrix initially had limited its sales area to the northeastern United States, by 1975 it was competing nationwide with MBNA for sales to Mercedes-Benz dealerships. Unlike MBNA, however, Metrix also sold Mercedes-Benz parts to independent garages specializing in the repair of Mercedes-Benz automobiles. Many of the parts Metrix sold were of identical make and manufacture as those distributed by MBNA. Although Metrix also obtained some parts from sources that MBNA did not use, these parts were designed for the Mercedes-Benz automobile and in many cases were functionally identical to those supplied by MBNA.

The majority of MBNA's "fast-moving" replacement parts were produced by independent manufacturers in West Germany according to DBAG's standards and specifications. DBAG subjected samples of the manufactured parts to quality control tests and, if satisfied, exported them to MBNA for resale to the dealerships. Although some of the parts Metrix imported were manufactured by the same West German independent manufacturers to DBAG standards and specifications, it did not employ after-purchase quality testing procedures.

Some of the West German parts manufacturers established distribution centers in the United States. MBNA purchased at least twenty percent of its total parts requirements directly from these outlets. However, MBNA subjected none of these parts to DBAG's quality control procedures and, like Metrix, performed no independent quality testing. Metrix also purchased parts from these domestic facilities and resold them to dealerships and to independent garages. Dealers who acquired parts from the American distribution centers therefore received products of identical quality, whether they purchased the part from MBNA, Metrix, or another wholesaler.

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for the sale of approximately 3,000 "fast-moving" replacement parts. According to Metrix, "fast-moving" parts accounted for 80% of MBNA's total parts sales to dealerships.

Uncontroverted trial evidence established that Metrix's lower prices, quicker deliveries, and ability to supply in many instances the identical product that MBNA offered were a profitable combination in Metrix's early years. Other independent warehouse distributors enjoyed similar competitive advantages. This rivalry took its toll on MBNA's replacement part sales to its dealerships. In the early 1970s, the market inroads of the warehouse distributors became significant. MBNA still possessed a high market share, but competition in the replacement parts market had cut into MBNA's profits.[7] According to Metrix, MBNA began enforcing the Section 9(C) requirements in the mid 1970s.

Although its business with independent garages had increased steadily, in 1976 Metrix's share of the dealer market began to slip. At the same time the evidence reflected that retail sales of Mercedes-Benz automobiles had reached a high point. MBNA had cut prices on some parts, but Metrix attempted to maintain an average twenty-percent margin between its prices and those of MBNA and had matched many of MBNA's price cuts. Nevertheless, Metrix's replacement parts sales to dealers fell in 1977 and 1978.[8] In 1979, Metrix filed this action.

In Metrix's case-in-chief, it principally tried to prove that MBNA used its franchise power generally, and the

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[7] Statistical evidence presented at trial demonstrated that MBNA always possessed a controlling share of the dealer market, a share greatly surpassing that of all the independent warehouse distributors combined.

The "dealer market," as that term is used here, refers to the market for wholesale sales of "fast-moving" replacement parts to Mercedes-Benz dealerships. Whether the dealer market constitutes a legally distinct market for the purpose of antitrust analysis is a question not subject to review in this appeal.

[8] Metrix's evidence showed that in 1975 it had a 4.22% share of the dealer market, but over the next four years its share dropped steadily to 1.04%.

allocation of new cars specifically, to force its dealers to comply with Section 9(C) of the franchise agreement. Its trial design was to show that MBNA officials linked new car access and other favorable treatment to the dealers' purchase of MBNA's "genuine" parts, creating a classic tying arrangement that was per se unreasonable. Alternatively, Metrix attempted to prove that MBNA's tying arrangement violated the Sherman Act under the rule of reason.

MBNA presented multiple defenses, but the ones that we consider in this appeal are those grounded on its interpretation of the Supreme Court's decision in *Pick*. It argued below and contends here that *Pick* established an "automobile exception" to the Sherman Act's proscription against tying arrangements. It also insists on appeal that even if *Pick* stopped short of establishing such a blanket exception, the Supreme Court's opinion still recognized a business justification defense to liability for automobile tie-ins. MBNA argues that its evidence established that defense as a matter of law, *i.e.*, its tying arrangement was essential to preserve the goodwill of its customers, as well as to protect itself from its dealers' fraudulent behavior. As an independent ground for reversal, MBNA asserts that the jury instructions on the business justification issue improperly shifted to it the burden of proving reasonableness in Metrix's rule of reason claim.

### A. *MBNA's Claim that Pick Established an "Automobile Exception" to Liability for Tying Arrangements*

MBNA contends that the Supreme Court's affirmance of the Seventh Circuit's decision in *Pick* carved out an "exception" to standard Sherman Act analysis of tying arrangements.[9] According to MBNA, this exception per-

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[9] In *Advance Business Systems and Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), we recognized that tying arrangements tend to impair competition by "prevent[ing buyers] from

mits automobile manufacturers to prohibit their dealers from purchasing replacement parts from independent sources.

In *Pick*, an independent manufacturer of automotive replacement parts, proceeding under Section 3 of the Clayton Act, 15 U.S.C. § 14, unsuccessfully challenged provisions in General Motor's (GM) dealer contracts that required the dealers to use only "genuine" GM replacement parts in their repairs of Chevrolet and Buick automobiles. The trial court found, and the Court of Appeals agreed, that the provisions were "reasonable and necessary to further [GM and its subsidiaries'] business as well as the interests of buyers of cars of their manufacture." *Pick*, 80 F.2d at 642. The Court of Appeals observed that the restriction preserved consumer goodwill toward the new car manufacturer and protected new car

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seeking alternative sources of supply for the tied product . . . [and by foreclosing] competing suppliers of the tied product . . . from that part of the market which is subject to the tying arrangement." *Id.* at 60. While these consequences might arise from any exclusive-dealing arrangement, the principal economic purpose of the legal prohibition against tying arrangements is to prevent the extension of market power from one product to another by anticompetitive means. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 14-16 (1984); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669 (7th Cir. 1985).

The Supreme Court has held consistently over the past four decades that tying arrangements that manifest certain threshold characteristics are unreasonable per se. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*Fortner II*); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

This court, of course, has applied the per se rule to tying arrangements where the relevant criteria were present. *See Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 840 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); *see also Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 628-29 (4th Cir. 1979); *Advance Business Systems*, 415 F.2d at 62-63.

warranties (which would be invalidated by the use of "non genuine" parts). *Id.* at 643. The Court of Appeals discussed both the "reasonableness" of GM's actions under the rationale of *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922), and the statutory element of substantial lessening of competition under Section 3 of the Clayton Act.[10] *Pick*, 80 F.2d at 643, 644. It concluded both that the tying provision was reasonable and that no substantial lessening of competition resulted from it. *Id.* at 644.

The Supreme Court affirmed the Seventh Circuit in a per curiam opinion. *Pick Manufacturing Co. v. General Motors Corp.*, 299 U.S. 3 (1936). Its decision, however, referred *only* to the issue of substantial lessening of competition under the Clayton Act:

> Upon the evidence adduced at the trial the District Court found that the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce. This finding was sustained by the Court of Appeals.
>
> Under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown.

*Id.* at 4 (citation omitted).

The Supreme Court's holding in *Pick* suggests no more than that it found no clear error in the lower courts' factual finding, *i.e.*, the plaintiff failed to prove that GM's tying arrangement substantially lessened competition, as required to establish a violation of the Clayton Act. Contrary to MBNA's contention, the Court simply did not consider or address the "reasonableness" of the tie-in as a matter of law, and its opinion bears none of the marks of an intended broad-based exception to the

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[10] 15 U.S.C. § 14. This section prohibits certain tying arrangements where the effect of the tie-in "may be to substantially lessen competition . . . in any line of commerce."

Sherman Act.[11] In contrast, there was evidence in the present case to support the jury's conclusion that MBNA's tying arrangement had a substantial anticompetitive impact. We therefore not only disagree with MBNA's expansive interpretation of *Pick*, but conclude that the evidence of anticompetitive impact forecloses any comparison with the Supreme Court's ruling in *Pick*.

There is a final reason why *Pick* cannot control the outcome of this case. *Pick* was decided solely under the rule of reason; it predated the application of per se rules

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[11] The Court's citations to *Pick* in the years immediately following the decision stood only for the Court's longstanding practice of accepting factual findings in which two lower courts concur. *See, e.g., Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 403 n.11 (1940); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 542 (1937). Moreover, nothing in the Court's subsequent antitrust decisions suggests that *Pick* established, even in its own day, a broad antitrust exemption for automobile manufacturers. In *Standard Oil Co. of California v. United States*, 337 U.S. 293, 302-04 (1949) (*Standard Stations*), the Court identified *Pick* as a case that predated *International Salt*, which established the per se rule against tying arrangements. The Court noted that the decision in *Pick* "len[t] support to the view" that a "showing as to the actual or probable economic consequences of [tying] agreements" is necessary to establish a violation of § 3 of the Clayton Act. In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 607 (1953), the Court cited *Pick* in a discussion of the development of tying law as a "goodwill" case falling within a doctrine whose boundaries were drawn by *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). Later citations to *Pick* in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 514 n.9 (1969) (White, J., dissenting) (*Fortner I*), and in *Hyde*, 466 U.S. at 41 (O'Connor, J., concurring) (quoting *Fortner I*, 394 U.S. at 514 n.9 (White, J., dissenting)), similarly do not refer to the decision as an exception that has endured the evolution of tie-in analysis. If anything, these latter citations suggest that the Court of Appeals opinion in *Pick* properly may be viewed as an early example of a possible business justification defense. *See United States v. Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1376 (N.D. Cal. 1981).

to tying arrangements by more than ten years. To interpret *Pick* as creating an "automobile exception," we would have to ignore our own precedent, *see Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), as well as four decades of Supreme Court precedent. Recently in *Hyde*, a majority of the Court expressly reaffirmed that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Hyde*, 466 U.S. at 9 (footnote omitted). In our view, not only does *Pick* not establish the reasonableness of MBNA's tying arrangement as a matter of law, but we perceive nothing in *Pick* justifying a departure from standard per se analysis in this case.

B. *MBNA's "Business Justification" Defense*

We turn to MBNA's contentions that it was entitled to a directed verdict or judgment notwithstanding the verdict on liability because it proved "every conceivable element" of a business justification defense. In this context, MBNA advances three related arguments. In the first two, MBNA contends that its tying arrangement was necessary to preserve consumer goodwill because (1) it ensured the quality of the replacement parts sold and (2) it fulfilled customers' expectations of receiving "genuine parts" at MBNA dealerships. MBNA's third argument is that the tie-in protected it from unscrupulous dealers who submitted warranty claims on non-MBNA parts. In light of the evidence presented at trial, none of these arguments persuades us. An asserted business justification cannot salvage a tying arrangement that is otherwise per se unlawful without proof that means less restrictive than the tie-in were not feasible to achieve the desired protection. *See Standard Stations*, 337 U.S. at 306; *see also Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1227 (9th Cir. 1982); *Carpa, Inc. v. Ward Foods*,

*Inc.*, 536 F.2d 39, 46-47 (5th Cir. 1976); ABA Antitrust Section, Monograph No. 8, *Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others* 18-20 (1982).

MBNA's first goodwill argument—that the tie-in was necessary to ensure the quality of the replacement parts sold by its dealerships—fails because its evidence did not meet the standard for a directed verdict or judgment notwithstanding the verdict. There was evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment could find that feasible means less restrictive than the tie-in were available to maintain quality control. *See Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); *cf. Betaseed*, 681 F.2d at 1227-28. It was undisputed that DBAG issued product design specifications to the West German companies that manufactured over half of the fast-moving replacement parts that MBNA sold to the dealers. This evidence dispelled the notion that it was not feasible to designate preferred manufacturers and provide them with design specifications.[12] The court therefore acted properly in submitting the quality control question to the jury and in refusing to overturn its verdict.[13]

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[12] In *Standard Stations* the Supreme Court observed that "[t]he only situation . . . in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied." 337 U.S. at 306.

[13] In light of the evidence presented, we cannot agree with MBNA that it proved that "product specification is no substitute for quality control" because DBAG, in its after-purchase testing procedures, rejects 47,000 shipments of parts annually for failure to meet its specifications. Although DBAG's testing procedures are documented in the record, MBNA's argument fails to account for the uncontroverted evidence that 20% of its parts underwent no after-purchase quality control procedures. These were the replacement parts MBNA purchased directly from the United States distribution arms of the West German manufacturers. As previously

MBNA next contends that its customers expected to receive "genuine parts" from MBNA-franchised dealerships and that this expectation constituted a valid justification for the tying arrangement. The evidence, however, suggests that MBNA could have satisfied its customers' expectations through less-restrictive means. Sufficient evidence was presented, for example, to support a finding that MBNA could have required its dealers to inform their customers of the origin of the parts sold [14] and marshaled its efforts toward informing the consumer of the need to request MBNA's parts. In this manner, a customer who expected MBNA parts could have purchased them.[15] It is not necessary, of course, to speculate on the jury's reasoning for rejecting MBNA's goodwill justifications. However, the evidence suggests that MBNA's judgment of its dealers and consumers ran contrary to the Sherman Act's policy that competition rule the markets of trade. As the Supreme Court observed in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953), "any intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others, anyway." Perceived consumer expectation, without more, will rarely justify an unlawful tie-in because it is "the public, acting through the market's impersonal judgment . . . [that] allocate[s] the

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noted, Metrix also purchased identical parts from these outlets and supplied them to the dealerships.

[14] Indeed, Section 9(D) of the franchise agreement provided that "[d]ealer shall not represent as new, genuine MB parts or as parts approved by DBAG any parts used by it in the repair or servicing of MB passenger cars, . . . which are not in fact new, genuine MB parts or parts expressly approved by DBAG or by MBNA."

[15] Preserving consumer goodwill obviously was important to the dealers; their businesses depended on it. It follows that the dealers voluntarily would have purchased only MBNA parts if they considered it necessary to ensure consumer goodwill. The evidence established, however, that the dealers frequently obtained parts from non-MBNA sources.

Nation's resources and thus direct[s] the course its economic development will take." *Id.*

In its final business justification argument, MBNA contends that the tie-in was necessary to protect it against "free-riding" on its replacement-parts warranty. It maintains that, absent the restraint, its dealers would submit non-MBNA parts to MBNA for warranty reimbursement and asserts that its "right to protect itself against this fraudulent practice should be self-evident." While MBNA, of course, may protect itself against unfounded warranty claims, it cannot impose a tying arrangement when less-restrictive alternatives are reasonably available. MBNA failed to show that its "genuine" parts could not be distinguished from those of its competitors and that it could not avoid reimbursing dealers for its competitors' defective parts. Even assuming the parts were indistinguishable, MBNA presented no evidence that procedures such as stamping, inscribing, or numbering were infeasible alternatives to protect it against warrany "free-riding." Finally, MBNA did not establish that the tie-in was necessary to police dealer misconduct. In its brief, MBNA asserts that its franchisees "commingle aftermarket parts with Mercedes parts in the same bins and do not distinguish between them in making repairs." This assertion, however, fails to establish that a replacement parts tie-in was the least restrictive method of avoiding unfounded warranty claims.[16]

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[16] Contrary to MBNA's contention, neither *Monstanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), nor *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), hold that tie-ins are reasonable if implemented to prevent unfounded warranty claims. The "free-rider effect" mentioned in *Sylvania* referred to the practice of returning defective goods of the same brand to a seller who did not make the sale in question. *Sylvania*, 433 U.S. at 55. This is a far cry from the "free-riding" of which MBNA complains.

Similarly, we cannot accept MBNA's alternative contention that it was entitled to judgment in its favor because it did not require

In summary, we conclude that the district court correctly denied MBNA's motions for a directed verdict and judgment notwithstanding the verdict on its affirmative business justification defense. The evidence was sufficient to preclude a grant of either motion.

C. *Jury Instruction on the Burden of Proving Business Justification*

We next consider MBNA's contention that the district court erroneously instructed the jury on the burden of proving business justification in Metrix's rule of reason claim. MBNA argues that the court misallocated the burden of proof in instructing the jury that:

> If you find the tying agreement in this case were [sic] unlawful as to the elements I have previously explained, either because they [sic] were a per se violation of the Sherman Act or because they were unreasonable under the rule of reason, and that MBNA caused Metrix's injury through its unlawful acts, you will then determine whether they [sic] were, in any event, proper because it was known [sic] as [a] legitimate business justification. The burden is on MBNA to demonstrate the existence of such a business justification.

MBNA asserts that this instruction improperly placed the burden on it to prove that its tie-in was reasonable under the rule of reason. We disagree.

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its franchises to stock "genuine" parts in excess of consumer demand. The district court correctly instructed the jury that a franchisor may require its franchisees to maintain a stock of the franchisor's products coordinate with consumer demand. In light of the evidence presented, however, the jury may well have concluded that MBNA's purposes for imposing the tie-in had little to do with anticipated consumer demand for its products. Indeed, the evidence suggests that MBNA did not enforce Section 9(C) until it lost significant numbers of sales to the independent warehouse distributors.

The trial court's instruction did not shift the burden of proof. The instruction directed the jury to make the business justification inquiry only if it first determined that the tying arrangement violated the rule of reason. Thus, the instruction could not have affected the jury's deliberations until after it had determined that Metrix had proved its rule of reason case.[17] In effect, it gave MBNA a second chance to avoid an adverse outcome—an opportunity to which it was not technically entitled under normal proof allocations in rule of reason cases.

## II. Sherman Act Damages

The trial court set aside the jury's award of damages to Metrix on its Sherman Act claim, holding that MBNA was entitled to a new trial on damages because the jury ignored evidence clearly demonstrating that a part of the lost profits Metrix claimed as damages resulted from MBNA's legitimate procompetitive business activities and not from the tying arrangement. The damages question certified by the district court, as properly applied to the issues developed at trial, is whether the jury's calculation of Metrix's damages was against the clear weight of the evidence.

Metrix presented its evidence of lost profits through the testimony of an economist, Dr. Edward Heiden, who concluded that Metrix lost approximately $2.3 million in profits as a result of MBNA's enforcement of Section 9 (C). He theorized that MBNA's increase in sales of "fast-moving" replacement parts between 1977 and 1981[18] resulted only from its unlawful tie-in. Heiden

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[17] Business justification, of course, is an affirmative defense to claims of per se illegality. Under the rule of reason, however, the plaintiff has the overall burden of negating any business justification by demonstrating the unreasonableness of the defendant's anticompetitive conduct.

[18] Although Metrix claimed that it lost sales between 1977 and 1981 as a result of MBNA's tie-in, it sought damages for 1977-

identified warehouse distributors' sales to independent garage repair shops as a "yardstick" against which to measure what Metrix's dealership sales would have been absent MBNA's tying arrangement. Through a comparative analysis of sales to independent garages during that time period, Heiden determined that, but for the tie-in, the independent warehouse distributors would have experienced a general market share increase of 13.9 percentage points in their dealership sales between 1977 and 1981. He then translated this projected growth figure into Metrix's lost profits, calculated the lingering effect of the tie-in on 1982 and 1983 sales, and concluded that Metrix lost slightly more than $2.3 million overall as a result of MBNA's unlawful conduct.

In defense, MBNA attempted to show that Heiden's analysis failed to account for the impact of price reductions and lawful marketing programs MBNA introduced while the tie-in was in effect. After several dealers testified that MBNA's procompetitive efforts influenced their replacement parts purchasing, Heiden testified on rebuttal that MBNA's lawful attempts to increase its sales had no overall impact on the dealers' purchasing practices. The jury rejected MBNA's evidence of lawful activities and returned a verdict for $2,335,301—the precise amount calculated by Heiden.

The district court set aside the jury's damage award to Metrix. It held that MBNA was entitled to a new trial on damages because the jury ignored the clear weight of the evidence, which established that at least part of Metrix's claimed losses were attributable to MBNA's lawful conduct. Metrix now contends that this was error and requests us to reinstate the jury's verdict. We disagree and decline. In *Wyatt v. Interstate & Ocean Transport Co.*, this court stated that in considering a new trial motion:

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1983, alleging that the effect of MBNA's unlawful conduct lingered for two years beyond its cessation.

> [A] trial court may weigh the evidence and consider the credibility of the witnesses. Indeed, a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, "if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice. . . ."

623 F.2d at 891-92 (quoting *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959)). Here, the clear weight of the evidence supports the trial court's conclusion that at least some of Metrix's claimed losses were attributable to lawful conduct. Although Metrix was not obligated to prove its damages with great particularity, we conclude that the trial court did not abuse its discretion in granting a new trial on damages.[19]

As Metrix correctly notes, plaintiffs generally enjoy a lenient burden of proof in establishing the amount of damages caused by an antitrust violation. The Supreme Court observed in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), that a reasonable amount of uncertainty and lack of precision is tolerable because "damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Id.* at 123. Moreover, a wrongdoing defendant should not profit at

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[19] Our review is limited to the trial court's ruling that the jury's damage verdict was against the clear weight of the evidence. Contrary to MBNA's argument and the authorities it cites, the district court did not rule that Metrix failed to prove "antitrust injury," *i.e.*, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489 (1977); *compare Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 386 (4th Cir. 1982), and *Lee-Moore Oil Co. v. Union Oil Co. of California*, 599 F.2d 1299, 1303-05 (4th Cir. 1979), *with Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co., Inc.*, 690 F.2d 411, 414-16 n.4. (4th Cir. 1982).

the expense of his victim where it is his own anticompetitive conduct that precludes direct and specific proof of damage. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).[20] Therefore, when the violation has been proven, "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential, as well as upon direct and positive proof.'" *Bigelow*, 327 U.S. at 264 (quoting *Story Parchment*, 282 U.S. at 564); *see also Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976).

In contrast with the "leniency" principle, our decisions also recognize that the antitrust plaintiff must demonstrate a causal connection between the defendant's *violation* and the damages claimed. *See Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 385 (4th Cir. 1982); *Lee-Moore Oil Co. v. Union Oil Co. of California*, 599 F.2d 1299, 1306 (4th Cir. 1979). As stated in *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co., Inc.*, 690 F.2d 411, 415 (4th Cir. 1982), "[a]n antitrust plaintiff is entitled to recover only for that portion of . . . [its losses] caused by the defendants' unlawful conduct." *See also Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506, 1510 (9th Cir. 1985); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1161, 1187 (7th Cir.) (majority and dissenting opinions), *cert. denied*, 464 U.S. 891 (1983).

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[20] This rationale takes on special force in market foreclosure cases because probable and inferential proof is often all that is available to hypothesize lost profits. *Cf. Bigelow*, 327 U.S. at 264 ("The tortious acts . . . precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions.").

Applying these principles, we agree with the district court that although Metrix presented a reasonable method for estimating damages,[21] the jury ignored the clear weight of the evidence that at least part of Metrix's claimed losses were attributable to lawful conduct. Heiden, Metrix's expert witness, conceded in rebuttal testimony that his calculations were based on his assumption that MBNA's legitimate marketing programs introduced in these years had no overall impact on Metrix's lost sales. This assumption, however, is contrary to the clear weight of the evidence.

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[21] We decline MBNA's invitation to hold that the independent garage "yardstick" method for proving damages is inappropriate in this case. If a plaintiff can demonstrate that its assumptions about market behavior rest on adequate bases and there is a reasonable comparability between the businesses or markets in question, it may properly rely on a "yardstick" measure of proof. *See Dolphin Tours*, 773 F.2d at 1511; *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. 1981). Here, it appears that the independent garage market was the only available index by which unfettered economic behavior could be measured. We cannot conclude that the "yardstick" method was flawed to the point of irrelevancy or was overly speculative. *Cf. Burlington Industries*, 683 F.2d at 386; *Crown Petroleum*, 602 F.2d at 632.

Competition for sales to Mercedes dealerships took place between warehouse distributors and MBNA. Competition for sales to independent garages took place between warehouse distributors and Mercedes' dealerships, who sold parts they obtained from MBNA and the warehouse distributors. MBNA contends that this distinction in market participants severely undercuts the validity of Heiden's assumptions. It contends that as the warehouse distributors sold more parts to the independent garages, they took business away from Mercedes-Benz dealers. Therefore, the dealers purchased less from the warehouse distributors than they otherwise would have bought. On the record before us, however, we cannot assess the effect, if any, of the horizontal relationship between warehouse distributions and Mercedes-Benz dealers in the independent garage market on the validity of that market as an index of behavior in an unfettered vertical market. Since it appears that the question goes more to the weight than to the admissibility of Metrix's theory, we leave it for the district court's consideration on remand.

MBNA presented direct evidence that at least part of Metrix's claimed losses were attributable to lawful competitive efforts commenced by MBNA during the damage years. It established that it had reduced prices on popular parts and instituted various procompetitive marketing programs during the years in question. It then presented the testimony of a number of dealers who stated that MBNA's price reductions and new programs influenced them to purchase more from MBNA and less from the warehouse distributors.[22] This direct evidence

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[22] MBNA presented evidence that between 1975 and 1978 it reduced prices on hundreds of parts. MBNA's purchasing manager testified that MBNA's sales of oil filters increased 300% as a result of price reductions ranging from 34% to 51%. Indeed, Metrix's president admitted in his testimony that Metrix's sales had declined when MBNA reduced its prices and that some of MBNA's reduced prices were below Metrix's costs for the same product.

In 1980, MBNA increased its standard "stock order" discount providing lower prices to dealers on certain regular purchases. Moreover, during 1980 and 1981, MBNA established an "obsolescence allowance" that provided discounts of up to 29% off the original list price.

Charlotte Mancine, owner of a small Mercedes-Benz dealership in Southern California, testified that her dealership purchased replacement parts from whomever offered the lowest price. She further stated that in 1978 she began purchasing more parts from MBNA because its "prices were lowered and the incentives or stock order allowances were better." Jules Barsotti, operator of three Mercedes-Benz dealerships in the San Francisco area, testified that in the early 1970s Metrix and other warehouse distributors supplied him with a substantial portion of his replacement parts needs, but in the late 1970s his purchases decreased because "Mercedes-Benz was getting more competitive and their prices were starting to be as good, if not better" than the prices offered by the warehouse distributors. John Burnett, a Mercedes-Benz dealer in Maitland, Florida, testified that MBNA's price reductions caused him to reduce his purchasing from warehouse distributors in the mid-1970s. MBNA presented the deposition of Mehmet Kara, parts manager of a Mercedes-Benz dealership, who testified that he analyzed the effect on "real price" of MBNA's obsolescence program, yearly stock-order bonus, and stock allowance and determined that his dealership made a higher profit selling MBNA parts than ware-

unequivocally contradicted Heiden's assumption that MBNA's lawful conduct had no overall impact.[23] We remain sensitive to the complexities of proving hypothetical market behavior. From our review of the record, however, we do not conclude that the district court abused its discretion in holding that the clear weight of the evidence established that at least some of Metrix's claimed losses were attributable to lawful attempts by MBNA to recapture dealer sales. The district court correctly set aside the verdict and granted MBNA a new trial on damages.

## III. Robinson-Patman Act Injury

At trial, the court submitted a special interrogatory to the jury on MBNA's Robinson-Patman Act counterclaim.[24] It asked "[d]o you find that Mercedes-Benz of

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house distributor parts, despite the higher raw cost of MBNA's parts. Finally, Rudolf Kraft, dealership owner in Pompano Beach, Florida, testified that although Metrix had a more efficient delivery system, his purchases from Metrix decreased in the late 1970s because of more competitive pricing by MBNA.

[23] The only procompetitive factors relevant to our analysis, of course, are those that were newly instituted by MBNA during the damage years. Since Heiden's formula compared purchasing behavior for the pre-damage years with purchasing during the years the tie-in was enforced, factors that remained constant over the period of comparison need not be considered in the damage calculation.

[24] As previously noted, we held in a prior interlocutory appeal that Metrix's incentive program violated Section 2(c) of the Robinson-Patman Act. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 235 (4th Cir. 1983). We described the salient facts of Metrix's program as follows:

> Metrix['s] . . . incentive program involves the awarding of points redeemable for either merchandise or cash or the payment of cash directly to the parts managers of the Mercedes-Benz dealers. These payments are based on a percentage of total parts purchased from Metrix. As consideration for the

North America was injured by reason of the illegal incentive program of Metrix." The jury answered "No." The trial court, however, granted judgment notwithstanding the verdict to MBNA, holding that MBNA had suffered injury from Metrix's program. The court also conditionally granted MBNA a new trial, should the judgment notwithstanding the verdict be overturned. The question certified by the district court, as properly applied to the issue developed at trial, is simply whether the court correctly applied the proper standards in granting judgment notwithstanding the verdict or, alternatively, a new trial.

In granting the judgment notwithstanding the verdict, the district court reasoned that "Metrix, acting rationally, would not have persisted in such a program unless it took sales from competitors," and that it was "simply irrational [for the jury] to find that Mercedes-Benz would not have made any extra sales but for the illegal incentive program." On appeal, Metrix contends that the jury's finding of no antitrust injury was clearly supported by the evidence. We agree. While injury usually results from per se violations of the antitrust laws, *Lee-Moore Oil*, 599 F.2d at 1303, this is not always true. The discrete characteristics of the replacement parts market simply do not lead inevitably to such a conclusion.

At trial, the evidence on MBNA's Robinson-Patman Act counterclaim was undisputed as to one issue. It

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payments, the payees perform no services other than placing their employers' purchase orders with Metrix.

Between February 1974 and June 1980, Metrix paid at least $119,980.80 in cash and $394,551.53 in cash and/or merchandise to parts managers of Mercedes-Benz dealers for the placement of approximately $13,000,000 in spare parts orders with Metrix. Payments are mailed monthly by Metrix to the parts managers at their home address. The value of the points is approximately 3½% of the purchase price.

*Id.* at 246-47.

clearly established that Metrix offered and awarded cash and prize "incentives" to encourage personnel at Mercedes-Benz dealerships to purchase replacement parts from Metrix. The conflicting evidence related to the effects of Metrix's program. MBNA attempted to show that absent the unlawful "incentives," some of Metrix's sales would have gone to it and that Metrix's program caused it to suffer approximately $2.3 million in lost profits. Metrix's evidence showed that "incentive" programs were standard among independent warehouse distributors and that if it had abolished its program, dealership personnel simply would have turned to other warehouse distributors for parts they otherwise would have bought from Metrix. According to the testimony of Metrix's witness, the dealerships that purchased parts from warehouse distributors were motivated by a combination of lower prices, quicker deliveries, and the availability of "incentives;" since MBNA offered none of these amenities, it lost no sales as a result of Metrix's program.

MBNA's evidence of antitrust injury principally consisted of the testimony of two dealership personnel and an economist. A dealer testified that contrary to instructions, an employee purchased parts from Metrix instead of MBNA to receive Metrix's commissions. In deposition testimony, however, the employee had stated that absent Metrix's program, he would have purchased from other warehouse distributors offering similar "incentives." At trial, the parts manager at another dealership attributed his purchases of Metrix's parts to a combination of factors, including lower prices, quicker deliveries, and the "incentive" payments. He did not state, however, that absent Metrix's illegal program, he would have purchased a greater percentage of parts from MBNA. Finally, an economist testified that if Metrix sold more parts because of its incentive program, it followed that MBNA sold less.

Metrix presented evidence that even without "incentive" payments, dealership personnel would have continued

to purchase from warehouse distributors because their prices were lower than MBNA's prices. Virtually every dealer who testified at trial stated that lower prices were the primary reason he or she purchased parts from the warehouse distributors. The lower prices offered by the distributors translated into a higher profit margin for the dealerships. Metrix also introduced evidence that if it had abolished its program, dealership parts managers simply would have purchased from other warehouse distributors who offered similar "incentives." Finally, Metrix produced evidence that its average monthly sales levels did not decline when it stopped paying "commissions" in 1983.

As plaintiff, it was MBNA's burden to prove by a preponderance of the evidence that Metrix's "incentive" program caused it to suffer actual injury of a type that Section 2(c) was designed to prevent. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270-72 (5th Cir. 1979); *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Allegheny Pepsi-Cola Bottling Co.*, 690 F.2d at 414 n.3. MBNA would have had the jury believe that any sales Metrix gained by virtue of the "incentive" program necessarily caused it to lose sales. This argument assumes that MBNA and Metrix were the only participants in the affected market and ignores the seven other independent warehouse distributors. Any sales increases attributable to Metrix's program may well have come from sales previously enjoyed by the warehouse distributors only.[25] For that matter, benign factors, including generally lower prices and quicker deliveries, could have determined whether a dealer made a particular purchase from an independent distributor or from MBNA. These were questions for the jury and, to reiterate, it was

[25] MBNA presented no direct evidence that Metrix's sales increased because of its program.

MBNA's burden to demonstrate a causal connection between Metrix's unlawful program and its lost profits. *Zenith Radio Corp.*, 395 U.S. at 114 n.9; *Advance Business Systems*, 415 F.2d at 63.

In our view, MBNA's evidence failed to sustain that burden. We cannot accept MBNA's argument that the mere payment of "commissions" to dealership personnel raised a necessary inference of antitrust injury to MBNA that was disregarded by the jury. Nor can we conclude, as did the trial court, that it was "irrational" for the jury to have made the subsidiary findings necessary to support a conclusion of no antitrust injury. Metrix's evidence was easily sufficient to support the jury's finding that MBNA suffered no lost sales from the "incentive" program. Put simply, the jury's verdict was supported by substantial evidence and was not against the clear weight of the evidence. We therefore reverse the district court's grant of judgment notwithstanding the verdict or, in the alternative, a new trial to MBNA on its Robinson-Patman Act counterclaim.

In view of the above, the district court's judgment is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

*AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Nos. 86-3522
86-3523

METRIX WAREHOUSE, INC.,
*Appellee,*

versus

DAIMLER-BENZ AKTIENGESELLSCHAFT,
*Defendant,*

and

MERCEDES-BENZ OF NORTH AMERICA, INC.,
*Appellant,*

versus

CARL SCHWARTZ
*Third-Party Defendant.*

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

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Filed: May 20, 1987

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As

no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Ervin and Judge Chapman.

For the Court,

/s/ John M. Greacen
Clerk

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Civil Action No. N-79-2066

METRIX WAREHOUSE, INC.

v.

DAIMLER-BENZ AKTIENGESELLSCHAFT, *et al.*

v.

CARL SCHWARTZ

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### ORDER

A hearing was held June 18, 1985 on all pending post-trial motions in the above-captioned case. The Court rendered from the bench an oral opinion on the record, making the following rulings:

That the defendants' and counter-plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is GRANTED in part and DENIED in part, to wit:

That the jury's verdict that Mercedes-Benz of North America acted in violation of section 1 of the Sherman Act is AFFIRMED;

That the jury's verdict that Metrix, Inc. was injured by Mercedes-Benz's violation of the Sherman Act is AFFIRMED;

That the damages award made by the jury is set aside and a new trial granted on the issue of damages;

That the jury's verdict that Mercedes-Benz of North America (MBNA) was not injured is set aside, and judgment notwithstanding the verdict entered that MBNA was injured by the violations of Metrix, Inc. and Carl Schwartz of section 2(c) of the Robinson-Patman Act. A new trial will be held on the issue of damages caused to MBNA.

The motions of the parties for permanent injunctions are DENIED, without prejudice;

The motion of the plaintiffs for attorney's fees is considered withdrawn without prejudice;

The motion of the defendant to interview the jurors by questionnaire is DENIED.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge

Dated: 19th June, 1985.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Civil Action No. N-79-2066

METRIX WAREHOUSE, INC.

v.

DAIMLER-BENZ AKTIENGESELLSCHAFT, *et al.*

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### MEMORANDUM

Currently pending are motions for reconsideration or, in the alternative, for certification brought by the plaintiff and the defendants. Now, in its sixth year of litigation,[1] the case has progressed to the post-trial motion stage. The parties have, as usual, thoroughly briefed the matter. Oral argument was held on November 27, 1985, and at the hearing, the Court orally certified for interlocutory appeal three of its rulings. This memorandum sets forth the rationale of those rulings to facilitate their consideration by the Court of Appeals.

### I.

This suit was commenced in November 1979 and tried in March 1985. At trial, the case consisted of two claims —the plaintiff's claim under § 1 of the Sherman Act and the defendants' counterclaim under § 2(c) of the Robinson-Patman Act. The jury returned a verdict for plaintiff Metrix on its claim in the amount of $2,335,310.00 [2] and

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[1] This includes one interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.

for counter-defendant Metrix on the counterclaim. Defendant and counter-plaintiff Mercedes-Benz subsequently moved for judgment notwithstanding the verdict or, in the alternative, a new trial on both claims.

In an opinion dated June 18, 1985, the Court ordered a new trial on the issue of damages on Metrix's claim and granted J.N.O.V. for counter-plaintiff Mercedes on the issue of liability under § 2(c), ordering a new trial as to damages. At the same time, the Court denied defendant Mercedes' motion for J.N.O.V. or new trial on the question of liability on Metrix's Sherman Act claim.

II.

29 U.S.C. § 1292(b) authorizes interlocutory appeals under certain circumstances, if a district court so certifies and the court of appeals accepts. The section provides in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

Thus, a district court may certify an order for appeal only if the three legislatively mandated criteria are met: (1) the order involve a controlling question of law; (2) substantial grounds for difference of opinion exist as to that question; and (3) the immediate appeal materially advance the ultimate termination of the suit.

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[2] Treble damages were awarded in the verdict, therefore totaling $7,005,930.00.

A.

Mercedes-Benz moved, and this Court ordered, that the following issue be certified for interlocutory appeal:

> Would it have been reasonable as a matter of law for Mercedes-Benz to have required its dealers to purchase replacement parts only from Mercedes-Benz when such parts are intended to be integrated into Mercedes-Benz automobiles and when such dealers are franchised to sell Mercedes-Benz products and repair Mercedes-Benz automobiles under the Mercedes-Benz mark and logo?

This question addresses an issue which has permeated this case for more than four years; namely, whether the Supreme Court's affirmance in *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936) operates to bar Metrix's claim under § 1 of the Sherman Act. Twice before Mercedes-Benz has requested that this issue be certified for appellate review, and twice before this Court has declined to do so. Now, however, the time is ripe for an appeal under § 1292(b).

The *Pick* issue is clearly a controlling question of law for its determination materially effects the outcome of the litigation. *In re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982), *aff'd*, 103 S.Ct. 1172 (1983). The essence of the *Pick* holding is that the restraints alleged to be illegal in this case are reasonable as a matter of law. Section 1 of the Sherman Act prohibits only unreasonable restraints of trade.

The material facts in this case are virtually identical to those in *Pick*. This Court has, however, held *Pick* inapplicable, based on subsequent developments in antitrust law, particularly the Supreme Court's analysis in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). If the Fourth Circuit determines that

*Pick* applies, then reversal would be in order. *Katz v. Carte Blanche*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) (a controlling question of law encompasses every order which, if erroneous, would be reversible error on appeal).

Substantial grounds for differences of opinion exist as to the applicability of the *Pick* exception. Three private suits have been brought recently against Mercedes-Benz based on Mercedes' parts policies, and all three courts have resolved the *Pick* question differently. Judge Biunno approvingly cited *Pick*, dismissing one suit. *IAP, Inc. v. Mercedes-Benz of North America, Inc.*, 571 F.Supp. 262 (D.N.J. 1983). Judge Patel rejected the *Pick* exception, except to shed light on the business justification defense. *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F.Supp. 1506, 1512 (N.D. Cal. 1984). This Court originally rejected *Pick*, *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D.Md. 1982), subsequently reconsidered and followed *Pick*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D.Md. 1983), and finally reinstated its earlier position, 1984-2 Trade Cas. (CCH) ¶ 66,226 (D.Md. 1984).

Because the *Pick* issue is dispositive of the Sherman Act claim and because the facts in this case are virtually identical to those in *Pick*, an immediate determination of its applicability by the Court of Appeals will advance the ultimate termination of the litigation.

B.

The Court also certified for interlocutory appeal its decision to overturn the jury's damage award to Metrix and order a new trial on the damage issue. This ruling raises two controlling questions of law: Under what circumstances, if ever, must an antitrust plaintiff adjust its damage computation to take into account possibly lawful competition? and Is it proper in an antitrust case for the trial judge to substitute his own view of witness

credibility for that of the jury's absent an award so excessive as to shock the judicial conscience?

While a plaintiff must generally segregate damage caused by unlawful acts from losses caused by lawful competition, *Allegheny Pepsi-Cola v. Mid-Atlantic Coca-Cola*, 690 F.2d 411, 415 (4th Cir. 1982), courts have noted circumstances in which the plaintiff need not do so. *See Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd on other grounds*, 104 S.Ct. 1464 (1984). The Fourth Circuit has not squarely addressed the issue. *See Allegheny Pepsi*, 690 F.2d at 415. In *Allegheny Pepsi*, the Court of Appeals rejected the plaintiff's theory of damages because it "made no attempt" to distinguish losses caused by lawful and unlawful acts by the defendant. The decision left open the question of whether the plaintiff might be excused from segregating lawful and unlawful acts if such a calculation were impossible or impractical. The Court did, however, approvingly cite *Coleman Motor Corp. v. Chrysler Co.*, 525 F.2d 1338, 1353 (3d Cir. 1975) in which that court rejected damage figures which were "attributable at least in part to . . . lawful competition" 690 F.2d at 415.

The Court of Appeals for the Seventh Circuit has enunciated an exception to the general rule requiring the disaggregation of damages:

> [A] plaintiff claiming injury caused by more than one of the defendant's unlawful practices need not prove the amount of damage caused by each illegal practice if the plaintiff shows that disaggregation is impracticable. [Instead, we hold that] if the plaintiff shows that such proof is impracticable, the burden shifts to the defendant to demonstrate the contrary.

*Spray-Rite v. Monsanto*, 684 F.2d at 1243. That Circuit's case law is, however, unsettled as to the contours of the exception. *Compare Spray-Rite*, 684 F.2d at 1243 (disaggregation excused when at least one of the named prac-

tices is part of an unlawful scheme) with *MCI Communications v. AT&T Co.*, 708 F.2d 1081, 1163-64 (7th Cir. 1983) (though estimating damages was impracticable, disaggregation required because the lawful conduct was deemed a major element of the injury).

At the conclusion of the trial, this Court charged the jury that it could consider the aggregate damage figures proposed by plaintiff Metrix's expert, Dr. Heiden, but that it should also consider the evidence of lawful competition into which defendant Mercedes-Benz entitled to enter. The Court subsequently ordered a new trial on the issue of damages because the jury ignored the latter instruction and Mercedes' lawful, but damaging acts. *Metrix v. Daimler-Benz*, transcript of June 18, 1985 hearing at 75.

Given the unsettled status of the law of disaggregation of antitrust damages, and its central role in this case, the issue meets the criteria of § 1292(b). Certification of this issue will materially advance the ultimate termination of this litigation because reinstatement of the jury award by the Appeals Court would avoid a needless second trial on the damage question and, if a new trial were deemed necessary, the appellate court's decision might well provide guidance for that proceeding.

C.

Finally, the Court certified for appeal its order directing a verdict J.N.O.V. in favor of counter-plaintiff Mercedes-Benz as to injury and granting a new trial on the damage component of the counterclaim.

The issue of liability on this claim was previously determined by the Fourth Circuit on interlocutory appeal. *Metrix Warehouse v. Daimler-Benz*, No. 82-2033 (4th Cir. Aug. 25, 1983). The Court of Appeals held at that time that the Metrix incentive program constituted a *prima facie* violation of Section 2(c) of the Robinson-Patman Act.

After trial, the jury returned a verdict that Mercedes was not injured by Metrix's incentive program. The Court, viewing the evidence in the light most favorable to Metrix, subsequently directed a verdict for Mercedes J.N.O.V. as to injury and ordered a new trial on the issue of damages. June 18 transcript at 78-79. Overwhelming direct and inferential proof of injury had been established at trial. The verdict was, therefore, set aside.

Counter-plaintiff Metrix challenges the Court's J.N.O.V. grant, and has requested that the following question be certified for appeal:

> Does a finding of a violation of Section 2(c) of the Robinson-Patman Act give rise to a presumption of fact of injury, i.e., impact?

In the interests of judicial efficiency, the Court has ordered that this question be so certified. Since the entire claim has been certified for appeal, immediate appellate review of the counterclaim will materially advance the ultimate termination of the suit. These savings of judicial time and litigants' expense satisfy the controlling question standard as well. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) ("'controlling' means serious to the conduct of the litigation either practically or legally. . . . And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor.")

III.

Also pending is Mercedes-Benz's motion pursuant to Fed. R. Civ. P. 50(c) for a conditional grant of a new trial to supplement the Court's verdict J.N.O.V. The motion is granted.

In directing the verdict J.N.O.V., the Court reviewed the evidence in the light most favorable to Metrix and found that the jury could not have reasonably returned

a verdict of no injury. Transcript at 77. Evaluating the evidence under the standard applicable to a motion for a new trial, *Gill v. Rollins Protective Services*, Nos. 84-1679 and 1680 (4th Cir. Sept. 26, 1985); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980), the Court finds the jury verdict against the clear weight of the evidence and unfair. We find this for the same reasons and on the same grounds specified on the record in our grant of J.N.O.V. Transcript at 77-79.

It is, of course, proper to apply the Fed. R. Civ. P. 59 standard in Rule 50(c) motions for a conditional new trial. *See Hampton v. Magnolia Towing Co.*, 338 F.2d 303 (5th Cir. 1964) (J. Wisdom) (where lower court refused motion for new trial, but granted motion for J.N.O.V., and judge's opinion demonstrated that he could not have employed weight of evidence test in passing on a new trial motion, case remanded). *See generally* Wright & Miller, Federal Practice and Procedure: Civil § 2539 (1971).

A separate Order will be entered confirming the rulings herein.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge

Dated: January 7, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Civil Action No. N-79-2066

METRIX WAREHOUSE, INC.

v.

DAIMLER BENZ AKTIENGESELLSCHAFT, *et al.*

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ORDER

In accordance with the foregoing Memorandum, and for the reasons set forth therein, IT IS, this 7th day of January, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That the motions for certification pursuant to 28 U.S.C. § 1292(b) of the Order dated June 19, 1985 BE, and the same hereby ARE, GRANTED;

2. That, pursuant to 28 U.S.C. § 1292(b), the following are deemed to be controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal of these questions may materially advance the ultimate termination of this litigation, and the following questions are hereby certified for interlocutory review by the United States Court of Appeals for the Fourth Circuit:

> a. Would it have been reasonable as a matter of law for Mercedes-Benz to have required its dealers to purchase replacement parts only from Mercedes-Benz when such parts are intended to be integrated into Mercedes-Benz automobiles and when such dealers are franchised to sell Mercedes-Benz products

and repair Mercedes-Benz automobiles under the Mercedes-Benz mark and logo?

b. Under what circumstances, if ever, must an anti-trust plaintiff adjust its damage computation to take into account possibly lawful competition?

c. Is it proper for the trial judge to substitute his own view of witness credibility for that of the jury's absent an award so excessive as to shock the judicial conscience?

d. Does a finding of a violation of Section 2(c) of the Robinson-Patman Act give rise to a presumption of fact of injury, i.e., impact?

3. That the motion of counter-plaintiff Mercedes-Benz of North America, Inc. for a conditional grant of a new trial pursuant to Fed. R. Civ. P. 50(c) on its counterclaim BE, and the same hereby IS, GRANTED; and

4. That the Clerk of Court shall forward copies of this Order and of the foregoing Memorandum to counsel and to the United States Court of Appeals for the Fourth Circuit.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge

## APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-592

MERCEDES-BENZ OF NORTH AMERICA, INC.,
*Applicant*,

v.

METRIX WAREHOUSE, INC., *et al.*

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 19, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 8th day of February, 1988.